

A Bakmawar Sdn Bhd v Malayan Banking Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D2-22-1732-1990
SITI NORMA YAAKOB J
29 MARCH 1991

B

Civil Procedure — *Injunction* — *Failure to disclose material fact* — *Evidence of the fact contained in annexure to affidavit* — *Court's attention not drawn to it* — *Discharge of interim injunction*

C

Banking — *Credit cards* — *Transactions unlawful and unauthorized* — *Right of bank to charge back disputed amount*

Words and Phrases — '*Fraud*' — *Meaning of fraud to include violation of law*

D

The plaintiff entered into an agreement with the defendant whereby the plaintiff agreed to accept all Malayan Banking cards issued by the defendant and tendered by the plaintiff's customers as a mode of payment for goods and beverages consumed by such customers at the plaintiff's restaurant. The defendant would, in turn, make full payment on such transactions to the plaintiff's current account with the defendant.

E

Sometime in September and October 1990, the defendant received complaints from two of its cardholders that transactions conducted on their cards at one of the plaintiff's outlets were not conducted by them. The defendant advised the plaintiff that it would execute a charge back on the disputed amount and the plaintiff's account with the defendant would be debited accordingly. Further, claims were made subsequently which were disputed by the defendants' cardholders. As a result of the charge back, the plaintiff had issued three cheques for payment but they were all dishonoured for lack of funds. Furthermore, the defendant had informed the plaintiff that it had already submitted to Biro Maklumat Cek ('the Biro'), information which would prohibit the plaintiff from opening a current account with any bank in Malaysia for such time in its name until it has been removed from the 'Black List' issued by the Biro. The plaintiff subsequently sought an ex parte interim injunction preventing the defendant from submitting details to the Biro and the defendant now applies to set aside the injunction. The issues raised before the court were: (i) whether the defendant has the power to charge back and debit the plaintiff's account; and (ii) whether there had been a non-disclosure of material fact when the second limb of the interim injunction was obtained.

F**G****H****I**

Held, discharging the ex parte injunction:

- (1) It was not disputed that there had been instances of unlawful and unauthorized use of the defendant's card at the plaintiff's outlet by person or persons unknown and the element of fraud is all too

apparent. Fraud is wide enough in cl 10 of the agreement to include as meaning a form of violation of law. The fact that in each credit card transaction the plaintiff had telephoned to get authorization made no difference to the defendant's right to charge back the transaction as the authorization merely confirms the floor limit of the particular cardholder. It does not confirm that the person tendering the defendant's card is a bona fide cardholder or that the said card is genuine or a forgery. As such, the defendant is entitled to rely on cl 10 and charge back the amount of the disputed sales.

- (2) The second limb of the interim injunction prevents the defendant from submitting details of the plaintiff's account to the Biro. The plaintiff was fully aware at the time when the interim injunction was obtained that the Biro was already in receipt of details of the plaintiff's account and the second limb of the interim injunction was therefore redundant and unnecessary. It is true that the defendant's letter was attached and exhibited to the application but the attention of the court was not drawn to the same. In such case, the court had been misled into believing that the Biro had not yet been informed of the plaintiff's account and on this ground alone, the interim injunction, at least the second limb, must be dissolved.
- (3) As the defendant had acted rightly under cl 10 of the merchant agreement to charge back and debit the plaintiff's account, there is no merit on the plaintiff's application for other prayers and the interim injunction is dissolved and other prayers dismissed with costs and damages to be paid by the plaintiff to the defendant be assessed.

[Bahasa Malaysia summary]

Plaintif mengikat suatu perjanjian dengan defendan di mana plaintiff bersetuju menerima semua kad Malayan Banking yang dikeluarkan oleh defendan dan diserahkan oleh pelanggan plaintiff sebagai satu cara pembayaran untuk barangan-barangan dan minuman yang dibeli oleh pelanggan-pelanggan tersebut dalam restoran plaintiff. Defendan pula akan membuat pembayaran sepenuh atas transaksi-transaksi tersebut kepada akaun semasa plaintiff dengan defendan.

Pada suatu masa dalam September dan Oktober 1990, defendan menerima aduan daripada dua pemegang kadnya bahawa transaksi-transaksi yang dibuat atas kad-kad mereka dalam salah sebuah daripada kedai plaintiff tidak dibuat oleh mereka. Defendan memberitahu plaintiff bahawa ia akan mengenakan satu caj kembali atas amaun yang dipertikaikan dan akaun plaintiff dengan defendan akan didebit kerana itu. Selanjutnya, tuntutan-tuntutan dibuat terkemudian yang telah dipertikaikan oleh pemegang kad defendan. Oleh kerana caj kembali itu, plaintiff telah mengeluarkan tiga cek bagi bayaran tetapi semuanya tidak dilayan kerana wang tidak cukup. Lagipun, defendan telah memberitahu plaintiff bahawa ia telah menghantar kepada Biro

A Maklumat Cek ('Biro itu') penerangan yang akan melarang plaintif daripada membuka satu akaun semasa dengan sebarang bank dalam Malaysia untuk sekian masa dalam namanya sehingga ia telah dikeluarkan daripada 'Senarai Hitam' yang dikeluarkan oleh Biro itu. Plaintif kemudiannya memohon satu injunksi interim ex parte menghalang defendan daripada memberi butir-butir kepada Biro itu dan defendan sekarang memohon untuk mengetepikan injunksi tersebut. Isu-isu yang ditimbulkan di hadapan mahkamah ialah: (i) sama ada defendan mempunyai kuasa untuk membuat caj kembali dan mendebit akaun plaintif dan (ii) sama ada terdapat ketakdedahan fakta material apabila bahagian kedua injunksi interim didapati.

C **Diputuskan**, membubarkan injunksi ex parte itu:

- D** (1) Adalah tidak dipertikaikan bahawa terdapat kejadian kegunaan yang tak sah dan tanpa kuasa kad-kad defendan di kedai-kedai plaintif oleh orang-orang yang diketahui dan unsur fraud adalah sangat terang. Fraud adalah cukup luas dalam fasal 10 perjanjian itu untuk turut membawa makna satu bentuk pelanggaran undang-undang. Fakta bahawa dalam setiap transaksi kad kredit plaintif terpaksa menelefon untuk mendapat pemberian kuasa tidak membawa perbezaan kepada hak defendan untuk mencaj kembali transaksi itu kerana pemberian kuasa hanya mengesahkan had kredit setiap pemegang kad. Ianya tidak mengesahkan bahawa orang yang menyerahkan kad defendan adalah pemegang kad bona fide atau bahawa kad tersebut adalah sejati atau tiruan. Oleh itu, defendan berhak bergantung kepada fasal 10 dan mencaj kembali amaun jualan yang dipertikaikan itu.
- E** (2) Bahagian kedua injunksi interim menghalang defendan daripada memberi butir-butir akaun plaintif kepada Biro itu. Plaintif sedar dengan jelas pada masa injunksi interim didapati bahawa Biro itu telah menerima butir-butir akaun plaintif dan bahagian kedua injunksi interim itu oleh kerana itu adalah berlebihan dan tidak perlu. Adalah benar bahawa surat defendan adalah dilampir dan diekshibit dalam permohonan tetapi perhatian mahkamah adalah tidak ditarik kepadanya. Dalam kes sedemikian, mahkamah telah dikelirukan untuk mempercayai bahawa Biro itu belum lagi diberitahu tentang akaun plaintif dan atas alasan ini sahaja, injunksi interim itu, sekurang-kurangnya bahagian keduanya, mesti dibubarkan.
- F** (3) Oleh kerana defendan telah bertindak secara betul di bawah fasal 10 perjanjian pedagang untuk mencaj kembali dan mendebit akaun plaintif, tidak ada merit dalam permohonan plaintif untuk permohonan lain dan injunksi interim dibubarkan dan permohonan lain ditolak dengan kos dan gantrugi yang harus dibayar oleh plaintif kepada defendan akan ditaksirkan.]
- G**
- H**
- I**

[*Editorial Note:* The defendant has appealed to the Supreme Court vide Civil Appeal No 02-6-91.]

Notes

For cases on application for discharge of interim injunction, see 2 *Mallal's Digest* (4th Ed), paras 1068-1071.

Max Yong (Chan & Kiru) for the plaintiff.

Fj Su (Yong & Khim) for the defendant.

Cur Adv Vult

Siti Norma Yaakob J: On 21 May 1988, the plaintiff entered into a merchant agreement with the defendant, whereby the plaintiff agreed to accept all Malayan Banking cards issued by the defendant and tendered by the plaintiff's customers, as a mode of payment for goods and beverage consumed by such customers at the plaintiff's restaurants. The defendant in turn would make full payments on such transactions through the plaintiff's current account with the defendant.

In the month of September and October 1990, a number of events occurred that triggered the filing of this suit. The defendant initially received complaints from two cardholders that transactions conducted with their cards in July and August 1990 at 'Russel's', one of the plaintiff's outlets, were not conducted by them and the total amount disputed was \$10,553.10. The defendant then advised the plaintiff that it will execute a charge back on the disputed amount and that the plaintiff's account with the defendant would be debited accordingly.

However before such charge back was effected on 16 October 1990, the defendant discovered other disputed sales, all emanating from 'Russel's' and as at 23 September 1990, the total disputed sales including the sum disputed earlier by the two cardholders, amounted to \$45,977.04. The defendant was not able to charge back the entire disputed sum of \$45,977.04 on 16 October 1990 as at that date, the plaintiff had only \$18,774.93 standing in its credit with the defendant and the defendant accordingly charged back the entire credit sum of \$18,774.93.

At about this time, the plaintiff presented three cheques for payment to the defendant, but the defendant dishonoured all the three cheques for lack of funds and advised the plaintiff so by letters dated 18 October 1990 and 20 October 1990. In the second letter dated 20 October 1990, the defendant also indicated to the plaintiff that details of the plaintiff's account had already been submitted to Biro Maklumat Cek at Bank Negara ('the Biro'), thereby prohibiting the plaintiff from opening a current account with any bank in Malaysia until such time its name has been removed from the 'Black List' issued by the Biro. The defendant also gave notice that it was taking steps to close the plaintiff's account on 2 November 1990.

It was to prevent a closure of its account with the defendant as well as to prevent the defendant from submitting details of its account to the Biro that the plaintiff applied and obtained an ex parte interim injunction on 1 November 1990. The plaintiff's ex parte application contained a number of other prayers as well but the plaintiff was agreeable to having the merits of the other prayers heard inter partes at a later stage.

On the application of the defendant to have the interim injunction set aside the following issues were raised:

- A** (1) Whether the defendant has the power to charge back and debit the plaintiff's account.
(2) Whether there had been a non-disclosure of material fact when the second limb of the interim injunction was obtained.

It is the defendant's case that it had powers under cl 10(c), (e) and (g) of the merchant agreement to charge back and debit the plaintiff's account. Clause 10 reads as follows:

Merchant agrees to pay bank the total face amount of any sales draft, and bank will have the right at any time to charge merchant's commercial account therefor without notice, in any situation relating to such sales drafts where:

- C** ...
(c) the sales draft is alleged to have been drawn improperly or without authority.
...
(e) the cardholder disputes the sale, quality, or delivery of merchandise or the performance or quality of services covered by the sales draft.
D ...
(g) sale of merchandise, performance of services, or use of a Malayan Banking Card thereof involves a violation of law or the rules or regulations of any governmental agency or otherwise.

- E** The plaintiff on the other hand maintains that the defendant's acts in charging back and debiting its account were unauthorized and unlawful and that it had wrongly invoked cl 10.

It is not disputed that there had been instances of unlawful and unauthorized use of the defendant's cards at the plaintiff's outlet by person or persons unknown and the element of fraud is all too apparent. Under such circumstances, has the defendant the authority to invoke cl 10?

- F** I answer this positively for although the word 'fraud' is not expressly mentioned in cl 10, para (g) of that clause is wide enough to include 'fraud' as a form of a violation of the law. The fact that with each credit card transaction, the plaintiff had telephoned the defendant to get its authorization to use its card, makes no difference to the defendant's right to charge back a transaction where it was subsequently discovered that such a transaction had been fraudulently conducted, as such authorization is nothing more than to confirm the floor limit, ie the credit limit of a particular cardholder. It does not confirm that the person tendering the defendant's card is a bona fide cardholder or that the said card is genuine or a forgery.
G This is clear from cl 5 of the merchant agreement itself which provides that the plaintiff cannot accept any of the defendant's card which exceeds the credit limitation of a particular cardholder.
H

On the facts of this case, I consider that the defendant did not act wrongly or negligently when it invoked cl 10 to charge back the amount of the disputed sales from the plaintiff's account.

- I** The second limb of the interim injunction prevents the defendant from submitting details of the plaintiff's account to the Biro. This Biro was set up by Bank Negara to monitor information pertaining to the occurrence of cheques dishonoured due to insufficient funds (bad cheques) and to dis-

close such information to any bank for the purpose only of assisting the bank to assess the eligibility of the drawer to maintain or open any current account with the bank. For this purpose, the Biro maintains a 'Black List' of all account holders who has been in the habit of issuing bad cheques and they will not be allowed to operate or open new current accounts until their names are removed from the list.

Before the details of an account holder is submitted to the Biro, the account holder must at least be guilty of issuing three bad cheques within 12 months from the date of the first bad cheque issued from the same account. In this case, the first bad cheque issued by the plaintiff was MBB cheque No 507519 dated 6 October 1990, which was paid into the payee's bankers, Chung Khiaw Bank Ltd on 19 October 1990 but dishonoured by the defendant on 20 October 1990 as at that date the plaintiff's credit account showed 'nil'. The other two MBB cheques issued by the plaintiff are numbered 507508 and 507529 and were dishonoured by the defendant on 17 October 1990 for insufficient funds.

As the instances of issuance of the three bad cheques happened within a period of 12 months, and the defendant wrote to the plaintiff on 20 October 1990 advising the plaintiff that it was submitting details of the plaintiff's account to the Biro, the plaintiff was fully aware that at the time the interim injunction was obtained on 1 November 1990, the Biro was already in receipt of the details of the plaintiff's account and that the second limb of the interim injunction was therefore redundant and unnecessary. It is true that the defendant's letter was exhibited to the plaintiff's ex parte application but it is incumbent upon the plaintiff on an ex parte application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made. Had my attention been drawn to the fact that the second limb of the interim injunction was no longer necessary as the Biro had already been informed of the plaintiff's account, I would not have granted the order. In this case the court has been misled into believing that the Biro has not yet been informed of the plaintiff's account and on this ground alone, the interim injunction, at least the second limb of the injunction, must be dissolved.

As for the other prayers in the plaintiff's application for the interim injunction, as I have considered that the defendant had acted rightly under cl 10 of the merchant agreement to charge back and debit the plaintiff's account for the disputed sales, there is therefore no merit on the plaintiff's application for the other prayers and I accordingly dissolved the interim injunction obtained on 1 November 1990 and dismissed the other prayers in the plaintiff's application with costs and directed that the plaintiff pay damages to the defendant to be assessed by the senior assistant registrar for wrongly securing the interim injunction and to be paid forthwith. The costs of the present proceedings will also be borne by the plaintiff.

Injunction discharged.

Reported by Yap Shao Sin